

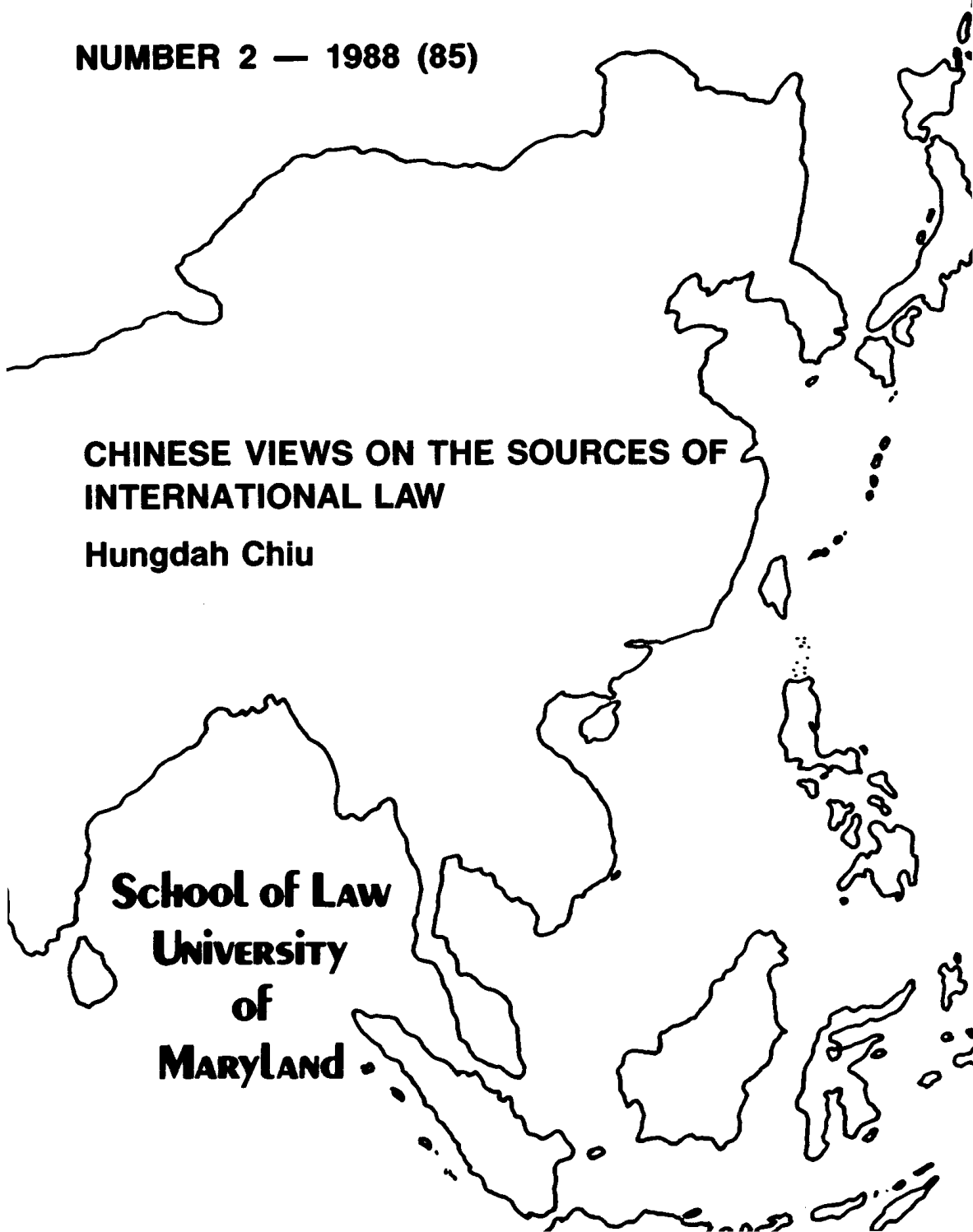
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**CHINESE VIEWS ON THE SOURCES OF
INTERNATIONAL LAW**

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**School of LAW
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of
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Chinese Views on the Sources of International Law

Hungdah Chiu*

I. INTRODUCTION

Since the death of Mao Zedong in September 1976, the People's Republic of China (PRC) has engaged in an ambitious modernization program; this has resulted in greater attention to the role of law in providing a stable and predictable environment for economic development. Internally, the PRC has taken steps to strengthen its legal system and to expand legal education and research.¹ Externally, with its abandonment of self-imposed "isolation" as its foreign economic policy, the PRC has renewed its interest in international law. During the last stage of Maoist rule, the 1966–1976 Cultural Revolution, the PRC had suspended virtually all study of international as well as domestic law. International law, however, has again become important to effectuate the Chinese "open door" policy of encouraging international trade, foreign investment in China, international economic cooperation, and scientific and cultural exchanges. One Chinese writer has stated the importance of the rebirth of international law study to China as follows:

So far as our country is concerned, [international law] is an indispensable legal means to realize socialist modernization and construction. For instance, in order to explore resources near our coast, we must study the legal status of the continental shelf, fishing zone and exclusive economic zone and international norms and custom between states in delimiting these regions.²

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The Pinyin system of transliteration of Chinese titles, names, places, etc., is used in this paper. When a Chinese journal or book is first cited, the transliteration with an English translation in parentheses is given; when the same journal or book is cited later, only the English translation is given. All literature cited in this article is available at the University of Maryland School of Law East Asian Legal Studies Library.

1. See generally *Law Reform Under the Post-Mao Leadership*, SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA, ANALYSIS AND DOCUMENTS 35–61 (1985); Hungdah Chiu, *China's Legal Reforms*, 84 CURRENT HISTORY 268–71, 275–76 (1985).

2. LIU FENGMIN, XIANDAI GUOJI FA GANGYAO (ESSENTIALS OF MODERN INTERNATIONAL LAW) 5 (1982). This book is reviewed by Hungdah Chiu in 79 AM. J. INT'L L. 466–68 (1985). A similar view is expressed in GUOJI FA GAILUN (INTRODUCTION TO INTERNATIONAL LAW) 2 (Wei Min ed. 1986).

In 1979, instruction and research in international law were restored in universities and colleges and Beijing University established the PRC's first international law section in its Department of Law.³ Later, the international law section at Beijing University was expanded to become the Institute of International Law, the first one in the PRC.⁴ In 1980, the Chinese Society of International Law was established; by 1982, it began to publish *The Chinese Yearbook of International Law*.⁵ Between 1979 and 1984, scholars produced more than 700 articles, as well as several books, on international law.⁶ This paper intends to analyse the views of Chinese writers on an important question of international law—the sources of international law.⁷ Where appropriate, available examples of Chinese practice will be discussed in connection with Chinese writers' views.

II. SOURCES OF INTERNATIONAL LAW—CHINESE VIEWS AND THEIR DEVELOPMENT

During the Maoist period, Chinese writers published only a small number of articles and books on international law.⁸ No one published an international law textbook, and only a few scholars commented on the sources of international law. One Chinese writer who discussed sources, however, divided the sources of international law into "substantive" and "formal" ones. The "substantive sources of bourgeois international law are the external policy of the bourgeoisie which is also the will of the ruling class of those capitalist powers."⁹ Treaties,

3. Wang Tieya, *Teaching and Research of International Law in Present Day China*, 22 COLUM. J. TRANSNAT'L L. 77 (1983).

4. *Id.* at 79.

5. ZHONGGUO GOUJI FA NIANKAN 1982 (CHINESE YEARBOOK OF INTERNATIONAL LAW, 1982) (1982).

6. Wang Zhongfang, *On the Situation and Task of Current Law Front of China*, ZHONGGUO FAXUE (LAW OF CHINA) 122 (1984). A list of the articles that appeared in journals can be found in DONG ZHAOHONG & LU XUEMEI, 1949–1984 FAXUE LUNWEN MULUJI (1949–1984 COLLECTION OF TITLES OF LAW ARTICLES) 595–618 (1986). Kong Fanyin, *Index to Articles on International Law Published in Newspapers and Journals 1979–1984*, in CHINESE YEARBOOK OF INTERNATIONAL LAW 625–42 (1986). Kong lists a total of 316 articles, including ones on public international law, private international law, and international economic or trade law.

7. For a more comprehensive study of the Chinese view on international law in general, see SALEM, THE PEOPLE'S REPUBLIC OF CHINA, INTERNATIONAL LAW, AND ARMS CONTROL 9–24 (1983) and a forthcoming article by Hungdah Chiu, *Chinese Attitudes Toward International Law in the Post-Mao Era, 1978–1986*, to be published in INT'L LAW (1987).

8. For a study of Chinese theory and practice of international law for this period, see generally Hungdah Chiu, *Communist China's Attitude Toward International Law*, 60 AM. J. INT'L L. 245–67 (1966); COHEN & CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY (1974).

9. Ying T'ao [Yin Tao in Pinyin], *Recognize the True Face of Bourgeois International Law from a Few Basic Concepts*, 1960 GUOJI WENTI YANJIU (JOURNAL OF INTERNATIONAL STUDIES) 47 (1960), translated in 1 COHEN & CHIU, *supra* note 8, at 71. The journal suspended its publication in the early 1960's and resumed publication in 1981. The English translation has since changed to INTERNATIONAL STUDIES.

custom, and other sources were merely the form in which international law was expressed.¹⁰ This view, however, did not appear to be shared by other Chinese writers.

In 1958 the Institute of Diplomacy's Office of Teaching and Research of International Law published a book of selected reference documents.¹¹ It included three documents under the heading of international law sources: (1) Article 38 of the Statute of the International Court of Justice;¹² (2) the Resolution of the United Nations General Assembly on Progressive Development of International Law and Its Codification (December 11, 1946);¹³ and (3) the Resolution of the United Nations General Assembly on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (December 11, 1946).¹⁴ The inclusion of treaties indicates that not all Chinese writers discounted formal sources. However, one cannot infer that Chinese publicists considered these three documents to be the only sources of international law, since the work was only a collection of reference documents. On the other hand, the exact attitude of Chinese writers toward international law sources was elusive during the Maoist period.

Most commentators recognized at least treaties and custom as principle sources. The PRC's practice of incorporating in many of its treaties the much-esteemed five principles of peaceful coexistence¹⁵ suggests a belief that the principles could become international law only in treaty form. Chinese writers appear to believe that treaties may be a source of general international law as well. Indeed, the proliferation of treaties incorporating the five principles, according to many, has transformed them into general international law.¹⁶ Chinese

10. *Id.* See also Chiu, *supra* note 8, at 257–58.

11. GUOGI GONGFA CANKAO WENJIAN XUANJI (COLLECTION OF SELECTED REFERENCE DOCUMENTS OF PUBLIC INTERNATIONAL LAW) 11, 12 (1958).

12. 59 Stat. 1055, T.S. No. 993 (1945).

13. G.A. Res. 94(1), U.N. Doc. A/64, at 187 (1947).

14. G.A. Res. 95(1), U.N. Doc. A/64, at 188 (1947).

15. The five principles are: (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual nonaggression; (3) mutual noninterference in each other's internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence. These principles were first incorporated in the preamble of the Agreement between the Republic of India and the People's Republic of China on Trade and Intercourse between the Tibetan Region of China and India, Apr. 29, 1954, reprinted in 1 COHEN & CHIU, *supra* note 8, at 119.

16. See, e.g., Ding Gu, *Firmly Maintain the Five Principles of Peaceful Coexistence*, JOURNAL OF INTERNATIONAL STUDIES, 1, 2 (1959); Zhao Yue, *A Preliminary Criticism of Bourgeois International Law*, JOURNAL OF INTERNATIONAL STUDIES, 1, 8 (1959); Wei Liang, *On the Post Second World War International Treaties*, GUOJI TIAOYUE Ji 1953–1955 (INTERNATIONAL TREATY SERIES 1953–1955) 660 (1961). However, these principles are by no means novel and appear to have been already accepted as principles of international law. See, e.g., J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 3 (5th ed. 1963). A prominent PRC writer also expresses the same view. See Zhou Gengsheng, *The Principles of Peaceful Co-existence from the Viewpoint of International Law*, ZHENGFA YANJIU (STUDIES IN POLITICAL SCIENCE AND LAW) 37–41 (1955).

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invocation of international custom in diplomatic notes¹⁷ or in academic writings¹⁸ indicates firm recognition of custom as an additional source of international law. It is not clear, however, whether Chinese writers consider judicial decisions¹⁹ and writings of publicists to be bona fide sources of international law.²⁰ Although some cite these sources to criticize the conduct of other states²¹ or to justify the Chinese position on specific issues of international law, their legitimacy has not become generalized.²²

In contrast, Chinese writers clearly differ about whether resolutions of international organizations are a source of international law. One prominent Chinese writer takes a completely negative position.²³

17. See, e.g., the Chinese note to Indonesia of November 4, 1965, which accused Indonesia of a "gross violation of the accepted principles of international law and international practice" as a result of Indonesia's "brutal encroachment upon the proper rights and interests of the Chinese nationals and their personal safety" in Indonesia. *Persecution of Chinese Nationals by Indonesian Right-Wing Forces*, 8 PEKING REV., No. 48 (Nov. 26, 1965), at 20-21, reprinted in 1 COHEN & CHIU, *supra* note 8, at 75-76.

18. See, e.g., Zhou Gengsheng, *The Persecution of Chinese Personnel by the Brazilian Coup d'Etat Authority is a Serious International Delinquency*, Renmin Ribao (People's Daily), Apr. 24, 1964, at 4.

19. One Chinese writer took a rather negative view of judicial decisions as a subsidiary source of international law:

[Bourgeois international law scholars] say that judicial decisions are a subsidiary source. But who made the so-called judicial decisions? The majority of decisions they invoke are those decisions rendered by the municipal courts or arbitral organs of big capitalist powers and the international judicial or arbitral organs under their manipulation. In accordance with whose will and whose legal standards were these decisions made? Everyone knows that these decisions were made in accordance with the will and demands of big capitalist powers.

Ying T'ao, *supra* note 9, at 47.

20. For example, one Chinese writer observes:

[Bourgeois international law scholars] say that teachings of publicists are also one of the subsidiary sources. The so-called "publicists" refers to "publicists" brought up by the bourgeoisie and in the latter's service, and the so-called "teachings" refers to those "teachings" which are formulated solely to carry out the will of the bourgeoisie, to do its legal planning, and to defend it in accordance with the external practices of the bourgeoisie. The teachings of those publicists with a sense of justice and progressive ideas are excluded and are attacked and condemned. Therefore, the substance of this source is easy to understand.

Id.

21. Zhou Gengsheng [Chou Keng-sheng in Wade-Giles], for example, cites L. Oppenheim's INTERNATIONAL LAW to support China's right to protect Chinese nationals in India. See *The Persecution of Chinese Nationals and Infringement of the Right of China to Protect Chinese Nationals by the Indian Government are Serious International Delinquencies*, People's Daily, Jan. 22, 1963, at 5, translated in part in 1 COHEN & CHIU, *supra* note 8, at 82-83.

22. Shortly after the PRC's 1958 declaration on extending the PRC's territorial sea to 12 miles and on the use of the straight baseline method to delimit China's territorial sea, a Chinese writer made reference to the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. 116, to justify the Chinese position. Liu Zeyong [Liu Tse-yung in Wade-Giles], *A Major Step to Protect China's Sovereign Rights*, 1 PEKING REVIEW, No. 29 (1958), at 13.

23. ZHOU GENSHENG, XIANDAI YINGMEI GOUJI FA DI SIXIANG DONGXIANG (TRENDS IN THE THOUGHT OF MODERN BRITISH AND AMERICAN INTERNATIONAL LAW) 67 (1963).

Other Chinese writers cite resolutions of the General Assembly of the United Nations to prove or to disprove the existence of a rule of international law.²⁴ In a comprehensive study of the sources of international law,²⁵ Professor Zhou Gengsheng considers two meanings of the term "sources of international law." One refers to the method or process of formulating valid legal norms in international law, i.e. custom and treaties. The other refers to the place where norms of international law first appeared: arbitral awards, decisions of international tribunals, decisions of domestic courts, writers' opinions, and diplomatic documents. The latter "sources," however, were not binding international law until long-term practice of various states transformed them into customary law. Accordingly Zhou concludes that only custom and treaties are sources of international law.²⁶ Thus Article 38(c) of the Statute of the International Court of Justice (ICJ)²⁷ does not establish "general principles of law recognized by civilized nations" as an additional source of international law.²⁸

In 1981 the PRC published its first international law textbook.²⁹ The editors, Professors Wang Tieya and Wei Min of Beijing University, take the position that treaties and custom are the two principal sources of international law. Although Wang and Wei acknowledge the view that article 38 of the Statute of the Court enumerates the sources of international law,³⁰ they deny that "general principles of law" are an independent source of international law.³¹

Wang and Wei consider judicial decisions, the writings of publicists, and the resolutions of international organizations "subsidiary means for the determination of rules of law."³² But despite Wang and Wei's classification of these possible sources as "subsidiary," the status

24. See 1 COHEN & CHIU, *supra* note 8, at 81-82.

25. ZHOU GENSHENG, *GUOJI FA (INTERNATIONAL LAW)* (1981). Professor Zhou Gengsheng completed his treatise on international law in 1964, but it was not published for internal circulation until 1976. It became available outside China in 1981. See also review by Hungdah Chiu in 77 AM. J. INT'L L. 977-80 (1983).

26. 1 ZHOU GENSHENG, *supra* note 25, at 9-10.

27. 59 Stat. 1031, T.S. 993, 3 Bevans 1153, 1187.

28. 1 ZHOU GENSHENG, *supra* note 25, at 13-14.

29. WANG TIEYA & WEI MING, *GUOJI FA (INTERNATIONAL LAW)* (1981). See also review by Hungdah Chiu, 77 AM. J. INT'L L. 977, 978-79 (1983).

30. WANG & WEI, *supra* note 29, at 26.

31. *Id.* at 32. One Chinese writer differs with this view by adopting the prevailing western view that "general principles of law" are a principal source of international law. Lan Haichang, *Answers to Essential Questions of "International Law," FAXUE PINGLUN (LAW REVIEW)*, No. 5, at 87 (1986).

32. See WANG & WEI, *supra* note 29, at 32-36. In *The Great Encyclopedia of China, Law*, these three sources are described as "subsidiary sources" of international law. Wang Tieya, *Guoji Fa de Yuanyuan (Sources of International Law)*, ZHONGGUO DABAIKE QUANSHU, FAXUE (THE GREAT ENCYCLOPEDIA OF CHINA, LAW) 194, 195 (1984). The same view is shared by other Chinese writers. See, e.g., Lan Haichang, *supra* note 31, at 87.

of decisions, writings, and resolutions remains controversial.³³ In particular, other scholars give judicial decisions and resolutions of international organizations more credibility as sources of international law.³⁴

A. Treaties

Chinese treatise writers generally agree that treaties are the most important source of international law.³⁵ One Chinese writer, however, asserts that treaties of an aggressive or plundering nature are null and cannot be considered sources of international law.³⁶

Wang and Wei argue that treaties are binding on contracting parties and create special international law obligations between them. Bilateral and multilateral treaties binding on a limited number of parties can also acquire the force of general international law binding on nonparties as well. Professor Zhou asserts that the same rule stipulated in many bilateral treaties may become an international custom and thus enter the sphere of customary international law. These bilateral treaties, however, are not a source of international law in the strict sense.³⁷ On the other hand, multilateral treaties that stipulate new general rules for future international conduct or proclaim or amend existing customary or conventional rules can sometimes be considered sources of general international law.³⁸ These usually are referred to as "law-making" treaties.

33. See, e.g., LIU FENGMING, *supra* note 2, at 34-35. However, he considers that some resolutions adopted by international organizations can also be considered as a source of international law. *Id.* at 35. Another writer considers that treaties and custom are two principal sources of international law but fails to discuss other sources. LU YINGHUI, GUOJI FA RUMEN (INTRODUCTION TO INTERNATIONAL LAW) 13 (1984).

34. See *infra* notes 73-78, 81-88, and accompanying text.

35. See, e.g., 1 ZHOU GENGSHENG, *supra* note 25, at 12; WANG & WEI, *supra* note 29, at 27; LIU FENGMING, *supra* note 2, at 34. INTRODUCTION TO INTERNATIONAL LAW, *supra* note 2, at 19-20.

36. LIU FENGMING, *supra* note 2, at 34. In 1960, a Chinese writer criticized bourgeois international law's inclusion of "unequal treaties" as a source of international law. See Ying T'ao, *supra* note 9, at 46.

37. ZHOU GENGSHENG, *supra* note 25, at 12.

38. WANG & WEI, *supra* note 29, at 27; 1 ZHOU GENGSHENG, *supra* note 25, at 12. Describing the process by which treaties may become a direct source of general international law, Professor Zhou notes:

Generally speaking, this question may be answered with respect to three situations. First, although some multilateral treaties initially do not have large number of contracting parties, they nevertheless include important countries at that time, such as the 1856 Declaration of Paris on Maritime Warfare. [15 Martens, N.R.G. 767; 115 Consolidated T.S. 1 (C. Clive ed. 1969).] This type of treaty may become custom through state practice and then enter the sphere of general international law. Second, some law-making treaties include certain norms which already have become part of international customary law, and the provisions of such treaties that include these norms are of a declarative (confirmative) nature. Moreover, these norms are still binding on non-contracting parties. Finally . . . it is

Wang and Wei offer a similar but more sophisticated explanation of treaties as sources of general international law. Their view gives (even bilateral) treaties a broader scope:

Under some circumstances, a bilateral treaty or a multilateral treaty with a limited number of parties may reflect [a trend of] general international law. Although it cannot directly establish general international law, it does indirectly result in general international law. For instance, if not just a few bilateral treaties, but many bilateral treaties adopt the same provision, that provision may become a general rule of international law. Moreover, although the provisions of a bilateral treaty or a multilateral treaty with a limited number of parties are not "lex lata," there is the possibility that such provisions are "lex ferenda," which may be transformed into "lex lata" in accordance with certain conditions. If such conditions are fulfilled, a bilateral treaty or a multilateral treaty with a limited number of parties may be related to the formulation of general international law. Even if such a relationship were not a direct one, it nevertheless would be an indirect one.³⁹

In general, Chinese writers' position on treaties as a principal source of international law does not differ in any meaningful way from that of Western writers.⁴⁰

B. Custom

Almost all major Western treatise writers or casebook editors on international law place custom before treaties as a principal source of international law.⁴¹ Except for Professor Zhou Gengsheng,⁴² almost all PRC writers place custom after treaties in their discussions on

generally considered that if the great majority of the countries of the world, including the major countries (in the modern sense especially the five big powers [i.e., China, the United States, the United Kingdom, France and the Soviet Union]), jointly participate in a law-creating treaty, the latter would have the binding force of general international law.

ZHOU GENSHENG, *supra* note 25, at 13.

This is similar to the view of a prominent Western treatise on international law. See 1 OPPENHEIM, INTERNATIONAL LAW 27 (H. Lauterpacht 8th ed. 1955). This treatise was translated into Chinese by two Chinese Professors. AOBENHAI GUOJI FA (OPPENHEIM'S INTERNATIONAL LAW, Vol. 1, 8th ed. 1955, and Vol. 2, 7th ed. 1952) (Wang Tieya & Cheng Tiquang trans. 1981).

39. WANG & WEI, *supra* note 29, at 30.

40. See, e.g., STARKE, INTRODUCTION TO INTERNATIONAL LAW 40-45 (9th ed. 1984). The 8th edition (1977) of this book was translated into Chinese. GUOJI FA DAOLUN (1984).

41. See, e.g., STARKE, *supra* note 40, at 31; 1 OPPENHEIM, *supra* note 38, at 25-27; BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-5, 12 (3d ed., 1979); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 36, 69 (1980).

42. 1 ZHOU GENSHENG, *supra* note 25, at 10-11.

principal sources of international law.⁴³ Despite this difference in arrangement, the standard textbook, edited by Professors Wang and Wei, acknowledges that "within a specific sense, international custom may be considered as the most important source [of international law] despite the existence of many multilateral treaties. This is because international custom still constitutes the greater part of general international law." Moreover, the book observes that "in the final analysis, all other sources of international law, including international treaties, generally must go through international custom to be effective."⁴⁴

Professor Zhou Gengsheng defines custom as those general practices of various states which have been accepted as law. Long-term practice of various states and the acceptance of this practice as law are thus two inseparable elements for creating custom. The "practice," according to Zhou, refers to the actions or omissions of various states regarding a particular matter. Usually, so-called state conduct concerns only the conduct of the executive branch of a state. However, if various states enact similar laws on certain matters or the courts of various states render similar judgments on certain cases, these factors also will demonstrate the general practice of various states toward such matters or cases.⁴⁵

Professor Zhou generally agrees with the view expressed in Lauterpacht's *Oppenheim*⁴⁶ that the question of when practice becomes custom is one of fact, not of theory. He cites a paragraph from that treatise:

All that theory can say is this: wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.⁴⁷

43. For example, Jiang Yang writes that the principal sources of international law are "international treaties and international custom." See Jiang Yang, *The Reactionary Thought of "Universalism" in American Jurisprudence*, People's Daily, Dec. 17, 1963, at 5. The same view appeared in WANG & WEI, *supra* note 29, at 27, 28. See also LIU FENGMING, *supra* note 2, at 34; LU YINGHUI, *supra* note 33, at 13; Lan Haichang, *supra* note 31, at 87; FAXUE CIDIAN (LAW DICTIONARY) at 541 (1984); Wang Tieya, *supra* note 32, at 195. INTRODUCTION TO INTERNATIONAL LAW, *supra* note 2, at 19.

44. WANG & WEI, *supra* note 29, at 28-29. Compare the following observation in a prominent Western treatise: "it must be emphasized that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations that treaties are binding upon the contracting parties." 1 OPPENHEIM, *supra* note 38, at 28.

45. 1 ZHOU GENSHENG, *supra* note 25, at 11.

46. OPPENHEIM, *supra* note 38, at 27.

47. ZHOU GENSHENG, *supra* note 25, at 11-12, citing 1 OPPENHEIM, *supra* note 38, at 27.

Wang and Wei generally agree with Professor Zhou on the creation of custom. But they take into consideration the approach of other Western writers to this question by differentiating between the material and psychological elements for creating custom. The former element refers to the repetition of similar conduct by various states; the latter reflects the acceptance of such similar conduct as legally binding⁴⁸ (i.e., *opinio juris sive necessitatis*).⁴⁹ The textbook also notes that modern communication and the frequency of intercourse among states in modern times greatly shortens the length of time for creating international custom. As an example of the expeditious formation of custom, the book cites the emergence of the law of the continental shelf in less than twenty years after the Second World War.⁵⁰

Wang and Wei's view on how to find evidence of international custom is similar to that of J.G. Starke.⁵¹ Evidence of international custom can be adduced from materials and documents emerging from the three sets of circumstances in which custom develops: (1) diplomatic relations between states as expressed in treaties, declarations and statements, various diplomatic documents, and other instruments; (2) practice of international organs as expressed in resolutions, decisions, and other means; and (3) internal conduct of states as expressed in internal laws, judgments, administrative decrees, and other formulations.⁵²

Western publicists have recognized the role of local custom in international law since the ICJ's decision in *The Right of Passage over Indian Territory* in 1960.⁵³ However, no Chinese writer has yet recognized local custom. Nor has any discussed the question of regional custom, such as the practice of diplomatic asylum in Latin America.

A closely related matter is the Chinese attitude toward codification of customs. Chinese writers generally support codification of customs in order to make those customs more clear and specific.⁵⁴ However, the PRC has hardly been active in this area. Despite the fact that the PRC was admitted to the United Nations in October 1971, it did not nominate a candidate to the United Nations International Law Commission until 1982.⁵⁵ The Commission is responsible for codification and development of international law. Similarly, the PRC did

48. WANG & WEI, *supra* note 29, at 29. Cf. STARKE, *supra* note 40, at 36.

49. Cf. STARKE, *supra* note 40, at 37.

50. WANG & WEI, *supra* note 29, at 29-30.

51. STARKE, *supra* note 40, at 35-36.

52. WANG & WEI, *supra* note 29, at 30.

53. 1960 I.C.J. 6, 39-43.

54. Cf. 1 ZHOU GENSHENG, *supra* note 25, at 38; WANG & WEI, *supra* note 29, at 41-42; LIU FENGMING, *supra* note 2, at 53.

55. *Law Commission Enlarged from 25 to 34 Members*, 19 U.N. CHRONICLE 40 (Jan. 1982).

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not nominate a candidate to the United Nations International Trade Law Commission until 1982.⁵⁶

C. General Principles of Law

Unlike the majority of Western writers,⁵⁷ Professor Zhou Gengsheng does not consider "general principles of law recognized by civilized nations" as a source of international law.⁵⁸ He also disagrees with the argument promulgated by Soviet scholars that "general principles of law" refers to general principles of *international* law.⁵⁹ Zhou contends that principles of international law cannot be sources of international law. The true meaning of the Article 38(c), according to Zhou, is to authorize the ICJ, in the absence of applicable norms to be found in customs or treaties, to apply general principles of law by analogy as a convenient measure to resolve the question at bar. Authorizing the ICJ to resort in certain extreme cases to general principles of law does not, however, convert them into a new source of international law. Another reason why general principles of law are not an independent source of international law is that Article 59 of the Statute specifically provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case."⁶⁰ General principles, therefore, could become a source of international law only when recognized through custom or treaty.

Professor Zhou's view does not seem to differ in substance from that of some Western writers. For instance, Professor M. Virally is of the opinion that:

[The "general principles of law" formulation in Article 38(1)(c)] empowers the Court, when both customary and conventional law will not suffice, to resort to the rules of municipal law for the disposal of cases submitted to it, or, to put it technically, Article 38 authorizes the use of analogy. But analogies may be drawn only from rules common to all systems of municipal law.⁶¹

While Zhou and Virally view general principles of law as authorizing the use of analogy to fill in gaps in international law, they differ in

56. *Elections and Appointments*, 20 U.N. CHRONICLE 13 (Jan. 1984).

57. See, e.g., 1 OPPENHEIM, *supra* note 38, at 29-31 and BROWNLIE, *supra* note 41, at 15-17.

58. See ZHOU GENSHENG, *supra* note 25, at 13-14.

59. See G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 190-203 (W.E. Butler trans. 1974).

60. ZHOU GENSHENG, *supra* note 25, at 14.

61. See Virally, *The Sources of International Law*, *MANUAL OF PUBLIC INTERNATIONAL LAW* 147-48 (Max Sorensen ed. 1968). Cf. 1 OPPENHEIM, *supra* note 38, at 29.

their views concerning general principles of law as an independent source of international law.

Wang and Wei describe three different views of the meaning of general principles of law. The first is to consider general principles of law as general principles of international law or fundamental principles of international law. But Wang and Wei reject this view as illogical. General or fundamental principles of international law are created through treaties or customs. Moreover, Article 38 of the Statute of the International Court of Justice lists general principles of law as an independent source.⁶²

The second view is to consider general principles of law as principles derived from general legal consciousness. This view assumes that the international community is similar to domestic society, which has a general legal consciousness and thus can derive general principles of law. But the international community is composed of sovereign states of different social and economic systems: it is not possible to create a "general" legal consciousness. Nor can one derive from such an abstract formulation as "general legal consciousness" concrete principles of law for the International Court of Justice to apply.⁶³

The third view is to regard general principles of law as principles common to the legal systems of various states. Although there are differences in the legal systems of various states, they do share some common general principles, even though the contents of these principles may not be entirely identical. For instance, all legal systems have the concept and institution of prescription. The content and conditions may differ, but all systems recognize that rights may be acquired or extinguished through prescription. Wang and Wei conclude that general principles of law should be understood as referring to those principles common to the legal systems of various states.⁶⁴ This is also the view of the majority of modern Western writers.⁶⁵

Despite the partial agreement of Chinese and Western views on the meaning of general principles of law, Wang and Wei do not consider general principles of law an independent source of international law.⁶⁶ Their textbook states:

It must be specially noted that general principles of law is not an independent source of international law. Article 38 of the [ICJ]

62. WANG & WEI, *supra* note 29, at 30–31.

63. *Id.* at 31.

64. *Id.*

65. See VON GLAHN, *LAW AMONG NATIONS* 22–23 (5th ed. 1986).

66. WANG & WEI, *supra* note 29, at 31. Some Western writers consider the general principles of law as an separate or independent source of international law, after custom and treaties. See, e.g., 1 OPPENHEIM, *supra* note 38, at 29–31, BRIERLY, *THE LAW OF NATIONS* 62–63 (6th ed. 1963); AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 40–41 (3d ed. 1977).

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Statute refers to general principles of law "recognized by civilized nations." The so-called "civilized nations" should not be interpreted in accordance with the view of Western capitalist nations which slander and vilify developing nations; instead, the term should mean to include all sovereign independent nations who are members of the international community. An important requirement [to apply general principles of law] is "recogni[tion]." Obviously, the general principles of law which have not been recognized by various nations cannot become a source of international law and only those general principles of law recognized by various nations [are capable of becoming] a source of international law. Since [general principles of law] must go through [the process of] recognition and nations express their recognition explicitly or implicitly through treaties or custom . . . general principles of law, in this sense, are merged together with the two principal sources of international law—international treaties and international custom, and thus [should not be considered] as an independent source of international law.⁶⁷

Wang and Wei's reasoning seems questionable. If general principles of law must be "recognized" either through treaties or custom, then it is unnecessary for the Statute of the International Court of Justice to include this source independently in Article 38. The Court would already have authority to apply general principles of law as either treaties or customs. Many Western writers endorse a view of general principles as sources of international law independent of treaty or custom. However, they generally agree that the Court should resort to general principles only when no applicable treaty or custom exists.⁶⁸ General principles of law provide a kind of reservoir of rules to be drawn on in case of need.⁶⁹

In practice, the International Court of Justice and its predecessor, the Permanent Court of International Justice, have used general principles of law only sparingly. Both Chinese and Western writers take note of this.⁷⁰ However, international arbitral tribunals frequently have resorted to "general principles of law" by analogizing to municipal law,⁷¹ a phenomenon that appears to have been overlooked by Chinese writers.⁷²

67. WANG & WEI, *supra* note 29, at 31-32.

68. See, e.g., STARKE, *supra* note 40, at 53.

69. Virally, *supra* note 61, at 147.

70. See, e.g., WANG & WEI, *supra* note 29, at 32; BROWNIE, *supra* note 41, at 20.

71. See BROWNIE, *supra* note 41, at 17; BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953).

72. See WANG & WEI, *supra* note 29, at 32; 1 ZHOU GENGSHENG, *supra* note 25, at 14.

D. Judicial Decisions

Only the standard textbook of Professors Wang and Wei discusses the question of judicial decisions as a source of international law.⁷³ The book criticizes some international lawyers in common law countries for exaggerating the role international judicial decisions play in the peaceful settlement of international disputes, and in expressing and proclaiming international law.⁷⁴

According to Wang and Wei, Article 59 of the Statute of the International Court of Justice clearly rejects the doctrine of *stare decisis* in the Anglo-American common law. Article 59 states that "[t]he decision of the Courts has no binding force except between the parties and in respect of that particular case." Wang and Wei also acknowledge that the International Court of Justice verifies and confirms principles and rules of international law when it decides disputes. Verification and confirmation are frequently invoked by the Court and other international tribunals and also are accepted generally in international practice.⁷⁵ However, Article 38 of the Statute of the International Court of Justice considers international judicial decisions a "subsidiary means for the determination of rules of law." Therefore, Wang and Wei conclude that judicial decisions are merely a subsidiary source of international law.⁷⁶ Neither Professors Wang and Wei nor other Chinese writers examine the law-creating function of the decisions or advisory opinions of the International Court of Justice and its predecessor, the Permanent Court of International Justice.⁷⁷

Professors Wang and Wei also deny that municipal court decisions can become a direct source of international law. While municipal decisions cannot express directly rules of international law, they can reflect the position of a state toward a question of international law and as such can have a derivative impact on the formulation of a rule of international law. Municipal court decisions can become quite significant in the formulation of rules of international law when the judicial decisions of many states express similar viewpoints on a question of international law. Wang and Wei conclude that municipal judicial decisions are also "subsidiary means for the determination of rules of law." But they argue that in comparison with international

73. Professor Zhou merely mentions that some international lawyers consider international arbitral awards or judgments rendered by the International Court of Justice a source of international law. ZHOU GENSHENG, *supra* note 25, at 14.

74. WANG & WEI, *supra* note 29, at 32.

75. *Id.* at 33.

76. *Id.*

77. See generally LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958).

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judicial decisions, municipal judicial decisions are better viewed as evidentiary materials for identifying international law.⁷⁸

E. The Writings of Publicists

Wang and Wei are the only Chinese writers who have commented on publicists' writings as a source of international law.⁷⁹ They assert that writings of publicists can only serve as "subsidiary means for the determination of the rules of law." They cannot directly express international law, but, like municipal court decisions, are more appropriately viewed as evidence of international law. They note that the growing availability of international legal materials has diminished the role of the writings of publicists in ascertaining rules of international law.⁸⁰

F. Resolutions of International Organizations

There is no consensus among post-Mao Chinese writings on the status of resolutions of international organizations as a source of international law. Wang and Wei take the by now familiar position that these resolutions are "subsidiary means for the determination of rules of law." The role of resolutions should be similar to that which Article 38 of the Statute of the ICJ assigns to judicial decisions and teachings of publicists. However, not all resolutions of international organizations qualify as even subsidiary means for determining rules of international law. Only the resolutions of universal organizations, such as the United Nations, that declare legal principles can serve this (restricted) function.⁸¹ Wang and Wei do not consider that the non-binding character of the resolutions necessarily prevents them from having legal consequences:

There are divergent opinions on the effect of the resolutions of the United Nations General Assembly. According to the provisions of the Charter of the United Nations, the function of the United Nations General Assembly is generally one of deliberation and recommendation. Except for resolutions relating to organizational and financial questions [which are legally binding], the resolutions of the General Assembly are in the nature of recommendations and do not possess legally binding force. However, one cannot infer from this fact that there would be no legal

78. WANG & WEI, *supra* note 29, at 33.

79. Wei Min made brief comments on this issue in his INTRODUCTION TO INTERNATIONAL LAW, *supra* note 2, at 21.

80. *Id.* at 34.

81. *Id.*

consequence of resolutions adopted by the General Assembly. Some resolutions of the General Assembly were adopted by unanimous or overwhelming majority votes of member states. Therefore, these resolutions not only have a certain binding force on those members who voted for their adoption, but also have general significance in international relations. In the meantime, some declarations included in certain resolutions may in whole or in part reflect existing or formative principles, rules, regulations or institutions of international law. Thus, these declarations undoubtedly become subsidiary means to determine principles, rules, regulations and institutions of international law. Consequently, one should consider resolutions of international organizations, especially certain kinds of resolutions of the United Nations, as parallel to judicial decisions and writings of publicists. [They have] become "subsidiary means for the determination of rules of law," though [these resolutions] are not direct sources of international law. Moreover, in view of their international character, their [priority as subsidiary means] should be higher than that of judicial decisions and writings of publicists.⁸²

Another Chinese scholar, Qin Ya, who made a very comprehensive study of the effect of resolutions of the General Assembly of the United Nations, disagrees in part with Wang and Wei. She would not limit General Assembly Resolutions to the status merely of subsidiary means of determining international law:

The term "sources" refers to the place where the norms of behavior with binding force first appeared, such as custom, treaties and others. . . .

Whether resolutions of the General Assembly of the United Nations can be considered as a "source" . . . depends on whether these resolutions can establish norms of behavior with binding force recognized by states The General Assembly does have this competence and there are situations where the resolutions of

82. *Id.* at 34-35. A similar view is expressed by Zhang Hongzeng. He observes:

In general, resolutions of the General Assembly are of recommendation nature. However, as the expression of the will of the majority of states in the international community [the resolutions] frequently do have important significance in the process of formulating international law. A General Assembly resolution may be considered as evidence of the existence of a legal rule. It may also be invoked to prove the existence of [a rule of] customary international law.

Zhang, *The Development of International Law in the Forty Years Since the Founding of the U.N.*, INTERNATIONAL STUDIES, No. 3, at 51 (1986). In a recent article Wang seems to modify his view of limiting the significance of United Nations General Assembly Resolutions to "subsidiary" sources. He now acknowledges that some resolutions have direct impact on international law and they are sometimes referred to as law-creating resolutions, i.e., resolutions which declare or create principles, rules and regimes of international law. Wang Tieya, *U.N. and International Law*, in CHINESE YEARBOOK OF INTERNATIONAL LAW 15 (1986).

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the General Assembly create new law or develop existing laws. . . . The Assembly's resolutions . . . relating to the relations of internal structure [of the organization], administrative rules or institutions may become the sources of the law of international organizations or international administrative law; and those resolutions of the Assembly of normative nature or establishing new norms of international law may become a source of general international law.⁸³

A similar view is expressed by Zhou Xiaoling.⁸⁴ While he acknowledges that Article 10 of the Charter of the United Nations characterizes resolutions adopted by the General Assembly of the United Nations as recommendations with no legally binding force, he asserts that certain resolutions of the General Assembly are binding on the behavior of states. Moreover, resolutions may become evidence of customary international law even before they ripen into custom or treaty in that they may indicate the direction and development of specific areas of international law. They frequently foreshadow legislation through the United Nations and exert direct influence on the formulation of specific rules of international law.⁸⁵

Liu Ding carries Zhou Xiaoling's view of the importance of the resolutions of international organizations even further. He argues that significant resolutions possess legal validity and should be considered a primary source of international law.⁸⁶

83. Qin Ya, *Legal Effects of the United Nations General Assembly Resolutions*, CHINESE YEARBOOK OF INTERNATIONAL LAW 189 (1984).

84. Zhou Xiaoling, *The United Nations and International Law-Making*, INTERNATIONAL STUDIES, No. 4, (1985). In particular, General Assembly Resolutions of normative nature relating to the rights and duties of states, interpretations of the Charter or other fundamental principles of international law and reflecting the will of the international community may be binding on the behavior of states. *Id.*

85. *Id.* at 28-29.

86. LIU DING, GUOJI JINGJI FA (INTERNATIONAL ECONOMIC LAW), at 14-15 (1984). He states:

According to international law, an international organization does not have legislative power and the resolutions it passes generally do not have binding force upon its members. . . .

However, resolutions of international organizations of significant importance, which are consistent with generally recognized guiding principles of international law, do possess legal validity and should be considered as a source of international law. The Declaration on the Establishment of A New International Economic Order and its Programme of Action adopted by the Sixth Special Session of the General Assembly of the United Nations on May 1, 1974 and the Charter of Economic Rights and Duties of States adopted by the Twenty-Ninth Session of the General Assembly of the United Nations on December 12, 1974, which confirm the permanent sovereignty over natural resources of states, sovereign equality of all states, the undeniable rights of all states to participate equally in resolving world economic problems and other principles, should have the validity of international law.

Id.

Assuming that some resolutions of international organizations, especially those adopted by the General Assembly of the United Nations, can be a source of international law, does it mean that the minority of states that voted against the resolutions should also accept the rules embodied in these resolutions as international law?

Only one Chinese writer, Qin Ya, has addressed this issue. Agreeing generally with the arbitral Tribunal in *Texaco Overseas Petroleum v. Libyan Arab Republic*,⁸⁷ she ascribes binding force to resolutions supported by the major political forces of the international community, even if not adopted by unanimous vote.⁸⁸ Professor Wang Tieya cau-

87. The decision in *Arbitral Award of Texaco Overseas Petroleum et al. v. Libyan Arab Republic*, 53 I.L.R. 486-487, 490, 491 (1977), states:

The general question of the legal validity of the Resolutions of the United Nations has been widely discussed by the writers. This Tribunal will recall first that, under Article 10 of the U.N. Charter, the General Assembly only issues "recommendations," which have long appeared to be texts having no binding force and carrying no obligations for the Member States. . . .

Refusal to recognize any legal validity of United Nations Resolutions must, however, be qualified according to the various texts enacted by the United Nations. These are very different and have varying legal value, but it is impossible to deny that the United Nations' activities have had a significant influence on the content of contemporary international law. In appraising the legal validity of the above-mentioned Resolutions, this Tribunal will take account of the criteria usually taken into consideration, i.e., the examination of voting conditions and the analysis of the provisions concerned.

. . . Resolution 1803 (XVII) [on Permanent Sovereignty Over Natural Resources] of 14 December 1962 was passed by the General Assembly by 87 votes to 2, with 12 abstentions. It is particularly important to note that the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The principles stated in this Resolution were therefore assented to by a great many States representing not only all geographical areas but also all economic systems. . . .

In fact, while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions. . . . the absence of any binding force of the resolutions of the General Assembly of the United Nations implies that such resolutions must be accepted by the members of the United Nations in order to be legally binding.

88. Qin Ya, *supra* note 83, at 169-70. She states:

If major states (big powers, countries related to them or blocs of countries) could not reach a consensus on a resolution adopted by the General Assembly [of the United Nations], especially if it is prescribed to establish a specific legal regime, it would not in practice be able to be implemented and would exist in name only even if that resolution were adopted by a majority of votes. The one state, one vote regime reflects the demand for the equality of all states, but since the size of states is different and there are wide discrepancies in the population and political and economic forces among states, such unequal strength necessarily is reflected in practice in the inequality of international "legislation." This is the reality of international politics. For a universal international organization, such as the United Nations, if it intends to play a certain role in international affairs, it must rely on the harmonious consensus of all major political forces in the international community. As a matter of fact, the formulation of rules of international customary law generally is based on the consensus of the legal opinions of major powers and on their practice. [Moreover, the fact that] a treaty is binding on contracting parties only does not prevent its becoming a part of a norm of international law. In view of this, unanimity is not a precondition for a resolution

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tioned that a state may cast its vote on political considerations, or a voting state may not consider its vote as an act of accepting legally binding force; thus under that circumstance, a resolution does not have legally binding force.⁸⁹

III. CONCLUSIONS

Chinese writers all agree that treaties and custom are two principal sources of international law. The writers are divided on the existence of additional sources of international law. Even writers who consider general principles of law, judicial decisions, writings of publicists, and resolutions of international organizations to be sources of international law differ in their assessments of the status of these sources. Under the current regime of limited academic freedom, these differences are expected to persist—as long as divergent views of the status of these sources do not challenge official policies. However, until the government embraces or condemns particular theories about international law sources, it will remain unclear what the official PRC government position is.

As between the two principal sources of international law, Chinese writers place more importance on treaties. During the Maoist period, treaty priority posed a problem because the PRC recognized or adhered to almost none of the then-existing important law-making treaties except the Charter of the United Nations and the four Geneva Red Cross Conventions.⁹⁰ As for custom, besides the problems of vagueness and the difficulty in providing sufficient evidence to prove its existence, at least one Chinese writer during the Maoist period criticized existing custom as “formulated by the external practices of big capitalist powers.”⁹¹ The scarcity of Chinese writings on international law during this period made it almost impossible to discern which, if any, then-existing international customs the PRC considered as binding upon it.⁹²

But with surprising speed the post-Mao PRC has adhered to many law-making treaties.⁹³ Despite the fact that the PRC has not yet

to produce legal validity. However, a resolution adopted merely by a majority is unable to establish its legal validity; it is necessary to examine the voting conditions to see whether the votes represent the consensus of states representing the major political forces.

89. Wang, *supra* note 82, at 19.

90. JOHNSTON & CHIU, *AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, 1949–1967: A CALENDAR* 11–12 (1968).

91. Ying T'ao, *supra* note 9, at 47 (1960).

92. See, e.g., Ardant, *Chinese Diplomatic Practice during the Cultural Revolution*, reprinted in part in 2 COHEN & CHIU, *supra* note 8, at 952–55.

93. See, e.g., 1951 Convention Relating to the Status of Refugees, 21 U.N.T.S. 137; the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; the 1963 Convention on Offences and Certain Other Acts Committed On Board

signed or ratified the 1969 Vienna Convention on the Law of Treaties,⁹⁴ a prominent Chinese writer has expressed the view that "the greater part of it is codification of existing international customary rules, though it also contains some new contents."⁹⁵ Current widespread participation in law-making treaties and a more positive Chinese attitude toward custom as a principal source of international law suggest that post-Mao China's view on sources of international law has changed significantly. The PRC's new willingness to acquiesce, at least through treaties, in Western notions of international law and its sources should make it easier for other states to identify those rules of international law which the PRC considers binding. A careful understanding of these norms and their sources will enhance others states' intercourse with the most populous country of the world.

Aircraft, 20 U.S.T. 2941; T.I.A.S. No. 6768; 704 U.N.T.S. 219; the 1967 Outer Space Treaty, 18 U.S.T. 2410; T.I.A.S. No. 6347; 610 U.N.T.S. 205; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; T.I.A.S. No. 7192; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564; T.I.A.S. No. 7570; and the 1972 Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; T.I.A.S. No. 8587. See also SHIJIE ZHIZHI NIANJIAN 1984 (1984 YEARBOOK OF WORLD KNOWLEDGE) 471-79 (1984).

94. U.N. Doc. A/CONF. 39/27 (May 23, 1969); U.N.T.S. No. 58 (1980), Cmnd. 7964.

95. Wei Min, *Vienna Convention on the Law of Treaties*, THE GREAT ENCYCLOPEDIA OF CHINA, LAW, *supra* note 34, at 585. See also Wei, INTRODUCTION TO INTERNATIONAL LAW, *supra* note 2, at 287.

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